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NO. 89-1763

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1989

BRENDA CORNWELL,

Petitioner,

v.

GARY CRAWFORD AND CITY OF RIVERSIDE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' STATEMENT OF QUESTION PRESENTED

Whether the indemnity provision of California Government Code Section 825(b) conflicts with and is preempted by federal common law or policy, such that the City of Riverside is precluded from paying a punitive damages award issued against one of its police officers as permitted by Section 825(b).

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents City of Riverside and Gary Crawford respectfully request that this Court deny the petition for writ of certiorari that seeks review of the Ninth Circuit's opinion in this case.

I.

OPINIONS BELOW

The order of United States District Court Judge Ferdinand F. Fernandez of the Central District filed July 22, 1988 is attached hereto as Appendix A to Respondents' Brief in Opposition, inasmuch as it was not included in the Appendix to the Petition.

II.

STATUTES INVOLVED

Because Petitioner omitted certain portions of California Government Code Section 825 from her Petition, and because Respondents believe that a more accurate view of the relationship between Section 825 and 42 U.S.C. Section 1983 is obtained by reading the entire California statute, it is set forth verbatim as Appendix B to this Brief in Opposition.

III.

STATEMENT OF THE CASE

This Petition concerns the sum of $4,000, and whether that sum can be paid by Respondent City of Riverside (hereinafter "City" or "Respondent") pursuant to California Government Code Section 825(b), or must be paid by Respondent Gary Crawford (hereinafter "Crawford" or "Respondent"), a Riverside police officer, out of his own pocket.

The City and Crawford disagree with the Petitioner's characterization of the incident which gave rise to the judgment in this case (see Petition, pp.3-4), but nevertheless submit that the underlying incident is not directly relevant to the question presented by the Petition. The City and Crawford do not dispute the fact that a judgment for compensatory and punitive damages was issued against Crawford as well

as several other Riverside police officers. Indeed, the City and Crawford have been attempting to satisfy that judgment since June of 1988. Respondents respectfully submit that what is relevant to the question presented by the Petition is the background surrounding Respondents' efforts to satisfy the judgment, and Petitioner's and her counsel's conduct in connection therewith.

After the jury returned its verdict in this case against Crawford and four other Riverside officers[1/] for a total of $415,229.97, Petitioner, through her counsel, Mr. Stephen Yagman, proposed a settlement of the litigation whereby the City, (not the individually named defendants) would pay the full judgment, plus attorneys' fees, within one week. Mr. Yagman threatened that if the

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1/ Carmen Andrade, Jackie Bell, Richard Bradley, and Benjamin Reiser. (Prior to the trial Petitioner dismissed, on her own motion, the City of Riverside, the Mayor and members of the City Council, as well as the Chief of Police and police officers Steve Shumway and John Start.)

settlement offer was not accepted, Petitioner would "never settle [the] case in a way that [would relieve] the individual officers" from paying the punitive damages award themselves.[2/]

On May 20, 1988 the defendants filed a motion for judgment notwithstanding the verdict and for a new trial.

Thereafter, more settlement negotiations were held between counsel. In a letter dated June 1, 1988, Mr. Yagman again offered to allow the City to pay the full judgment, including the punitive damages, at an increased amount of $525,000; but if not, Petitioner would then attach and seize the property of the individual police officers

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[2/] Supplemental Excerpts of Record, pp. 18-19, 22-24 (hereinafter referred to as "Supp. R. ___"). Citations to the Excerpts of Record shall be referred to as "R. ___". Respondents have cited to the record below in places where they consider such citation important, even though the record is not now before the Court.

and garnish their wages "for the rest of their lives, if necessary." (Supp. R. 23-24.) At one point, Mr. Yagman even demanded that the City pay all of the damages in cash dollars, not by check, because he and his client did not consider the checks to constitute "legal tender." (Supp. R. 19-20, 31.)

On June 27, 1988, United States District Judge Ferdinand F. Fernandez signed and filed an "Order Regarding Motion for Judgment Notwithstanding the Verdict and for New Trial." He denied the motion for judgment notwithstanding the verdict, but conditionally granted a motion for new trial unless Petitioner accepted a remittitur of the total punitive damages award from $327,000 to $45,000.

On July 1, 1988 Petitioner filed her "Notice of Acceptance of Remittitur." (R. 20 (item 76).)

Thereafter, however, Petitioner filed a "Notice of Motion and Motion for Reconsideration of the Court's Order of Remittitur on Amount of Punitive Damages, Etc." Petitioner's counsel asserted that, inasmuch as it is "apparent that the City will pay the punitive damages," Judge Fernandez should reinstate the original judgment because, at the time he issued the remittitur, he was not aware that the City intended to pay the punitive damages portion of the award. (Supp. R. 9-11.)

Judge Fernandez denied the motion in a written order filed July 22, 1988. He first pointed out that no evidence was admitted regarding the assets of the individual defendants. He then went on to observe:

> "The Court was, and is, of the opinion that [a judgment for punitive damages] levied against the

officers personally would not only underscore the impropriety of their actions for them, but would also be a standing warning to all others regarding such actions.

"The Court does not accept the plaintiff's major premise that the award here loses most of its value if the officer does not pay it.

"First, the same could be said about compensatory damage awards, particularly when there is insurance. However, those of us who are involved in the legal system know that ordinary people feel very strongly about being accused of wrongdoing and found responsible for others' injuries, even when there is insurance to cover the damages awarded.

"Secondly, the award is against the individuals and they have no right to be paid by the City or anyone else, and that must be, and remain, a concern of theirs. California Government Code Section 825(b) does not require payment by the City. Rather, the governing body must make a decision regarding the particular case before payment is authorized.

"Third, it can be expected that no public entity likes paying out money, and police officers, and others, must be aware of that fact, and must be aware of the possible political repercussions of authorizing the payment of punitive damage awards." (App. A. infra, 1a-2a.)

Judge Fernandez concluded:

> "In any event, the Court does not believe that it should be concerned about where the defendants ultimately obtain the money to pay any awards against them, be it from their own assets, from a relative, from an association, from a fund-raiser, or from a public entity. Nor is the Court concerned about what their arrangements with the other individual, who comes forward after the award is made, might be." (App. A. infra, A2-A3 (emphasis added).)

Respondents subsequently filed a Motion for Order Confirming Satisfaction of Judgment in light of the fact that the City had tendered payment of both the compensatory and punitive damages portions of the

remittitur on behalf of Crawford and the four other officers.

At a hearing on September 26, 1988, Judge Fernandez provided for the separate payment of compensatory damages and punitive damages, together with interest. He ordered that if Petitioner refused to accept the payment of punitive damages "from defendants, CARMEN ANDRADE, JACKIE BELL, RICHARD BRADLEY, GARY CRAWFORD, and BENJAMIN REISER (or from the city of Riverside or anyone else)" that a stay of execution against enforcement would take effect pending an appeal. (App. C to Petition, 10a.)

On October 7, 1988 counsel for Respondents presented Mr. Yagman with two checks drawn on the client trust account of the law firm of Roberts & Morgan (trial counsel of record for Respondents). The checks represented separate payment of the compensatory damages with interest, and

punitive damages with interest. Yagman refused to accept the check representing the separate payment of punitive damages with interest. (Supp. R. 17-21.) Acknowledgement of the satisfaction of the compensatory damages and interest portion of the judgment was filed October 13, 1988. An appeal to the Ninth Circuit followed.

In her briefs submitted to the Ninth Circuit, Petitioner argued that she has a "right" to insist upon payment of punitive damages from the individual officers, and further that the "entire purpose of assessment of punitive damages would be thwarted by permitting the government to pay [them]." Petitioner relied exclusively on excerpts from the United States Supreme Court's decision in City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981) to support her contention that the "federal common law of punitive damages" requires an individual against whom

punitive damages are assessed to pay those damages out of his own pocket.

The Ninth Circuit rejected Petitioner's arguments, and also rejected a petition for rehearing and for hearing en banc. (Copies of the Ninth Circuit's opinions are attached as Appendices A and B to the Petition.)

Finally, after the parties had briefed the matter before the Ninth Circuit but before its decision was issued, Petitioner accepted payment of the punitive damage awards against officers Carmen Andrade, Jackie Bell, Richard Bradley and Benjamin Reiser from the City of Riverside. Petitioner still refused, however, to accept payment of the remaining $4,000 assessed against officer Gary Crawford from the City. It is that portion of the judgment below, and that portion alone, which is the subject of this Petition.

IV.

REASONS WHY THE PETITION SHOULD BE DENIED

Despite Petitioner's mischaracterizations to the contrary, the legal arguments contained in the Petition are based almost exclusively on language drawn out of context from the Court's decision in City of Newport v. Fact Concerts, 453 U.S. 274, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981).[3/]

[3/] The only other authorities which Petitioner cites as support for the claim that a "federal common law of punitive damages" exists and prohibits indemnity for punitive damages are Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), and a jury instruction from Devitt & Blackmar.

Owen concerned the question of whether a municipal defendant in a Section 1983 case is entitled to the defense of qualified immunity. The portion of the decision to which Petitioner refers concerned the Court's view of the purpose of Section 1983 claims in general. In fact, Petitioner misquotes the excerpt, and omits language which shows that the Court was specifically considering the liability of public agency defendants. See Owen, 445 U.S. at 651-652.

With respect to the jury instruction, the current volume of Devitt & Blackmar contains, at Section 85.11, an instruction on the present worth of future loss. It has

Petitioner claims that the decision of the Ninth Circuit below is "glib" and is based upon the "panel's author's antipathy to civil rights plaintiffs." (Petition, p. 15.)

The basic premise of Petitioner's argument is that this Court somehow concluded in Fact Concerts that an individual who has had a punitive damages award assessed against him under 42 U.S.C. Section 1983 cannot have that award paid for him by his public agency employer if the agency so chooses. As explained below, Petitioner's argument is entirely without foundation. The decisions of the Ninth Circuit and the trial court below in this case are correct and are not "at odds" with federal law. They are, in fact, entirely consistent with principles of comity and federalism.

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nothing to do with punitive damages. In any event, a proposed jury instruction is not very persuasive on the question of the scope of federal law -- especially when Petitioner mis-cites it and fails to cite to the underlying authority for the instruction.

Petitioner's "policy" arguments are also without merit. As the courts in this case below have found, punitive damage awards do not necessarily lose their effectiveness if an individual reaches some arrangement to have the award paid on his behalf. What is more, the actions of Petitioner's own counsel in connection with the judgment in this case indicate that Petitioner is not so much concerned with abstract policy considerations as with exacting as high a payment as possible from Respondents.

A. There Is No Federal "Common Law" Rule Concerning Punitive Damages Which Requires Preemption Of The Indemnity Provisions of California Government Code Section 825(b) And Thus Prevents A Public Agency From Paying Such An Award For The Individual.

Respondents respectfully submit that the main argument in the Petition consists of a "house of cards." Petitioner's assertion that she is legally entitled to prevent a public agency from paying a punitive damages award on an individual's behalf is based upon the assumption that there is some body of law, known as the "federal law of punitive damages," which requires that one who has a punitive damages award assessed against him must pay that award out of his own pocket. This "federal law of punitive damages", as Petitioner calls

it, is in turn purportedly based upon certain statements made by this Court in the Fact Concerts case, and what Petitioner calls basic "principles of retribution." Thus, Petitioner asserts, the courts in this case below have engaged in a "faulty construction of federal law," and have decided this case "at odds with previous assumptions." (Petition, p. 7.) Indeed, the only "assumptions" which are involved here are Petitioner's, and they are without merit.

Petitioner has not asserted, and cannot assert, that Congress intended to "occupy the field" with respect to civil right claims (and attendant procedural matters) when it enacted the Civil Rights Act of 1871, 42 U.S.C. Section 1983. Petitioner instead claims that there is a direct conflict between California Government Code Section 825(b) and Section 1983.

Petitioner sees the source of this purported conflict in language from the Court's decision in Fact Concerts, and she cites excerpts from it extensively in her Petition. (Petition, pp. 8-11.) She then sums up her "discussion" with the following conclusion, which consists mostly of quotations taken out of context from the Fact Concerts opinion:

> "This Court unequivocally has declared that the malice of individual government officials 'should not be attributed to the taxpaying citizens of the community' and that a municipality cannot 'be responsible for the malice of its officers.' 'Punishment properly [can be] applied only to the actual wrongdoers.' 'Retribution should [not] be visited upon the shoulders of blameless or

unknowing taxpayers.'" (Petition, p. 11.)

The Court's decision in Fact Concerts was rendered in a context significantly different from this case. In Fact Concerts, this Court ruled that municipalities are immune from the assessment of punitive damages under 42 U.S.C. Section 1983. The case involved a civil rights claim by concert promoters that the City of Newport, Rhode Island and its officials violated their rights to freedom of expression when the City cancelled the concert organization's license. The trial judge instructed the jury that it could award compensatory and punitive damages against all defendants, including the municipality.

This Court reviewed the question and concluded that, in enacting Section 1983 in 1871, Congress did not intend to abrogate the pre-existing common law principle that a

municipality is immune from exemplary damages. Fact Concerts, 453 U.S. at 258-266. The Court went on to consider whether public policy dictates that Section 1983 should be construed differently than these common law principles of immunity. Id. at 266-271. The Court concluded that the common law immunity afforded to municipalities should remain in force, and that neither Section 1983 nor public policy concerns should change that result. Id. at 271.

In footnote 30 of its opinion, the Court noted that several state statutes relating to indemnity of municipal employees "specifically exclude indemnification for malicious or willful misconduct." The Court cited rules from five states, including Section 825 of the California Government Code (prior to its amendment in 1985 which added subsection (b) concerning punitive damages). Id. at 269, footnote 30.

Petitioner and her counsel have attempted to stretch the application of the Fact Concerts decision from one where a municipality is rendered immune from involuntary assessments of exemplary damages, to a ruling that a municipality is prevented from choosing to indemnify certain officers or employees pursuant to state statute.

This Court only ruled in Fact Concerts that Section 1983 cannot involuntarily expose municipalities to liability for exemplary damages in contravention of the common law rule. The question of voluntary indemnification of an individual employee by a municipality was clearly not before the Court, and no tortured reading of the decision by Petitioner and her counsel can make it so. The fact that the Court reaffirmed municipal immunity from exemplary damages clearly does not mean that state statutes relating to indemnity are prohibited by, or conflict with, the Fact Concerts

decision or any purported "federal law of punitive damages" stated therein.[4/]

In addition, as evidenced by footnote 30 of the opinion, the Court was aware that only a few states had indemnity provisions which actually prevent a public agency from indemnifying a public officer for judgments for exemplary damages. The Court made no ruling whatsoever that the remaining statutes which permit such indemnification conflict with Section 1983. To the contrary, the fact that the Court acknowledged them without extending its ruling indicates that it did not consider a conflict to exist.[5/]

[4/] In this regard, Petitioner's citation to Guillory v. County of Orange, 731 F.2d 1379 (9th Cir. 1984) and Martinez v. California, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980) are misplaced. Those cases dealt with actual immunity from liability, not with indemnity.

[5/] Petitioner may argue that the Court impliedly approved of those statutes which exclude indemnification for punitive damages because it mentioned in footnote 30 that some commentators approved of such an exclusion. This clearly does not mean, however, that the federal civil rights law conflicts with the

Two other federal courts have rendered decisions which are consistent with this interpretation of the scope of the Fact Concerts opinion and footnote 30. In Bell v. City of Milwaukee, 746 F. 2d 1205 (7th Cir. 1984), the Seventh Circuit considered, inter alia, the relationship between a Wisconsin law which required indemnification of public officials and Section 1983. The City of Milwaukee argued, as Petitioner argues here, that the Court's decision in Fact Concerts overrode the state statute. Id. at 1271. Thus, the city asserted, it was not required to pay the judgments assessed against the individual defendants. Id.

The Seventh Circuit rejected the city's argument. It noted that, in footnote 30 of the Fact Concerts opinion, the Supreme Court recognized the existence of such indemnity for punitive liability, and further

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remaining statutes, or are otherwise improper.

impliedly recognized that a public agency may, because of the effect of state law, ultimately pay a punitive damage award assessed against its employees. Bell, 746 F. 2d at 1271.

In Haile v. Village of Sag Harbor, 639 F. Supp. 718 (E.D.N.Y. 1986), the plaintiff brought, inter alia, Section 1983 claims against the Village of Sag Harbor, the Town of Southampton, and several of its police officers for excessive force. The plaintiff sought punitive damages from the police officers. Relying on Fact Concerts, Southampton argued that the claims for punitive damages should be dismissed because New York law required an agency to indemnify its officers, and Southampton was thus, in effect, the real party in interest. Id. at 723.

The Haile court rejected the argument:

> "This result is wholly unjustified. The Supreme Court in [Fact Concerts] held simply as a matter of statutory construction that the Congress which enacted the original civil rights statute did not intend to create a punitive damages remedy against municipalities . . . To accept defendants' argument would require the Court to misread [Fact Concerts], which expressed no view on the allocation of liability under state law . . ." Id. at 723-724.

The Ninth Circuit Court of Appeals and the California Supreme Court have considered the general relationship between California Government Code Section 825 and federal law, and have failed to find preemption. In Demery v. Kupperman, 735 F. 2d

1139 (9th Cir. 1984), cert. denied, 469 U.S. 1127, 105 S. Ct. 810, 83 L. Ed. 2d 803 (1985), the Ninth Circuit ruled that the general indemnity principles of Section 825 do not mean that a judgment against a state employee violates Eleventh Amendment principles of sovereign immunity. The court stated that "California's obligation [under Section 825] to pay the damages awarded against its employees derives from an entirely collateral and voluntary undertaking on the part of the state." Id. at 1148-1149.

In Williams v. Horvath, 16 Cal. 3d 834, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976), the California Supreme Court ruled that at least the pre-amendment indemnification provisions of California Government Code Section 825 apply to actions brought under the Civil Rights Act of 1871. The State Supreme Court ruled, inter alia, that nothing in the federal authorities indicates that local agencies are precluded from

providing indemnity to its employees in a Section 1983 action. Id. at 844. While the Williams decision was rendered before the 1985 amendment to Section 825 which added subsection (b) relating to punitive damages, the California Supreme Court implicitly noted in Williams that, upon proper statutory authorization, a local agency could indemnify an officer for punitive damages:

> "[I]t is suggested that police officers, like other officials, at times may abuse their authority, and the law demands they be held to answer for any wrong so committed. Thus it may be argued that to permit indemnification would remove an effective deterrent to illegal police conduct -- the potential of personal liability. But in truly egregious cases the indemnification statues expressly forbid reimbursement by the entity, and indemni-

fication without authorization would be open to a charge of unlawful gift of public funds. Secondly, the indemnification provisions in effect facilitate the bringing of actions against erring public servants, because the plaintiff is assured that the financial resources of the entity will stand behind the judgment. Thirdly, we might also reasonably surmise that indirect entity liability through indemnification will cause the entity to exercise an additional degree of caution in the hiring and supervision of employees whose functions carry a greater risk of potential liability.

"Accordingly, we conclude that the indemnification provisions remain applicable whether the action is grounded on the Tort Claims Act or on

Section 1983." Id. at p. 848 (footnote omitted).

Because there is no real federal pronouncement, as Petitioner advocates, which preempts a state's right to enact indemnification legislation, Petitioner's discussion of the preclusive effect of 42 U.S.C. Section 1988 is meaningless. This is because Section 1988 only operates to nullify state law if there is some actual conflict or inconsistency between state and federal law. See Board of Regents v. Tomanio, 446 U.S. 478, 485, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980).[6/] Moreover, Petitioner's discussion

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[6/] For example, in Robertson v. Wegmann, 436 U.S. 584, 98 S. Ct. 1991, 56 L. Ed. 2d 554 (1978), the Court considered whether Louisiana survivorship law applied in a Section 1983 claim asserted on behalf of a deceased plaintiff by his executor. The Court ruled that the Louisiana rule was not inconsistent with federal law. Id. at 593 and fn. 11. Similarly, in La Raza Unida v. Volpe, 545 F. Supp. 36 (N.D. Cal. 1982), the Ninth Circuit concluded that a California requirement for a legislative appropriation to pay court-awarded attorney's fees directly conflicted with the attorney's fees provisions of Section 1988. Id. at 38-39.

of the application of Section 1988 presumes, without any legal support, that state principles of indemnity are to be equated with other, substantive state rules or with certain remedies which may or may not be available under Section 1983.[1/] The mere availability of state indemnity provisions in a Section 1983 case, in the absence of some actual conflict with Section 1983, is insufficient to invoke the preclusive provisions of Section 1988. The availability of governmental indemnification of officials under state law does not "nullify" a judgment or remedy under Section 1983, nor does it affect

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[1/] Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), Brazier v. Cherry, 293 F.2d 401 (5th Cir.) cert. denied, 368 U.S. 921, 82 S. Ct. 243, 7 L. Ed. 2d 136 (1961), Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969), and Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983), all discussed the application of Section 1988 in terms of the availability of particular remedies. Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), dealt with the appropriate period of limitations.

or impair a plaintiff's substantive rights under Section 1983.

Petitioner has tried to characterize this case as involving a direct conflict between state indemnity statutes and Section 1983 such that preemption principles and the preclusive terms of Section 1988 apply. As the foregoing discussion points out, however, a public agency's decision to invoke the indemnity provisions of California Government Code Section 825(b) is a matter which is entirely separate and distinct from the fact of the punitive damages judgment itself. Under such circumstances, principles of comity and federalism dictate that the federal courts should not needlessly encroach upon the authority of the states to authorize such "collateral and voluntary" action. See Demery, 735 F.2d at 1149; see also Molina v. Richardson, 578 F.2d 846, 852 (9th Cir.) cert. denied, 439 U.S. 1048, 99 S. Ct. 724, 58 L.Ed. 2d 707 (1978)(California indemnity

statutes, when applied to Section 1983 claims in federal courts, "at once serve the interests of federalism and general constitutional values").

B. Petitioner's Assertion That Preemption of California Government Code Section 825(b) Is Further Mandated by Policy Considerations Is Based Upon a Narrow View of the Purpose and Effect of Punitive Damages Awards.

Petitioner also asserts that Section 825(b) should be preempted because "the purposes of assessment of punitive damages in civil rights actions do not permit such burden-shifting" and because "traditional notions of punishment and responsibility do not permit" it. (Petition, p. 11.) These policy arguments do not add anything to the Petition.

Petitioner essentially claims that once an individual defendant in a Section 1983 claim is indemnified by his agency for punitive damages, that judgment loses most or all of its effectiveness as punishment or deterrence. As noted by Judge Fernandez below, however, the same could be said about compensatory damage awards for which there is insurance coverage. What is more, an award of punitive damages against an agency's employee does not necessarily lose its impact on that employee even if he does not pay it -- the mere fact that such a judgment is entered may be punishment enough -- and it certainly will not lose its effectiveness as a "standing warning" to others, as Judge Fernandez put it. (App. A, infra, A2.) This is especially so with respect to Section 825(b) because the employee does not have an unqualified right to have the judgment paid for him. The agency must voluntarily decide to authorize the payment, which, as Judge

Fernandez recognized, it may not always decide to do for political or other reasons. (See App. A, infra, A2; see also Williams v. Horvath, 16 Cal. 3d 834, 848, 129 Cal. Rptr. 453, 548 P. 2d 1125 (1976).)

What is more, Petitioner's policy argument that a punitive damage award must be paid by the individual defendant would also mean that payment could not come from any other source, such as a private foundation, an employees' association, or even a friend or relative. (See App. A, infra, A3.) This absurd and unnecessary result further exposes the untenable nature of Petitioner's argument. This Court and the lower federal courts should not, and clearly need not, become involved in supervising the source of payment of damages awards under Section 1983.

Finally, the so-called policy arguments which Petitioner's counsel so vigorously asserts cannot be too important,

because Petitioner herself was willing at one point to even accept payment of the punitive damages award from the City itself provided the payment was sufficiently high. And, even after the remittitur was issued and while this case was before the Ninth Circuit Petitioner did, in fact, accept payment of the amounts in the remittitur from the City on behalf of all but one officer.

V.

CONCLUSION

For the foregoing reasons Respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERTS & MORGAN
JOHN M. PORTER
and
ADAMS, DUQUE & HAZELTINE
RICHARD R. TERZIAN
MARGARET L. OLDENDORF

Counsel for Respondents

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FETUS CORNWELL, et al., Plaintiffs,	) CV 86-3107 FFF)) ORDER REGARDING) RECONSIDERATION vs.) OF REMITTITUR ORDER)
CITY OF RIVERSIDE, et al., Defendants.	) (Filed July 22, 1990))))

The Court has reviewed the plaintiff's Request for Order Shortening Time, and has also reviewed the proposed motion for which the Order Shortening Time is requested.

The Court will grand the Application for Order Shortening Time, but, pursuant to its discretion under Fed. R. Civ. P. 78 and Local Rule 7.11, will order the matter submitted at this time without oral argument. The Court will now rule, since further briefing would be fruitless.

As the Court has previously indicated, the punitive damages in this matter were levied against the officers for their actions. The Court deemed those damages appropriate, without consideration of the individual's own assets -- a matter not in evidence. The Court was, and is, of the opinion that such an award levied against the officers personally would not only underscore the impropriety of their actions for them, but would also be a standing warning to all others regarding such actions.

The Court does not accept the plaintiff's major premise that the award here loses most of its value if the officer does not pay it.

First, the same could be said about compensatory damage awards, particularly when there is insurance. However, those of us who are involved in the legal system know that ordinary people feel very strongly about being accused of wrongdoing and found responsible for others' injuries, even when

there is insurance to cover the damages awarded.

Secondly, the award is against the individuals and they have no right to be paid by the City or anyone else, and that must be, and remain, a concern of theirs. California Government Code Section 825(b) does not require payment by the City. Rather, the governing body must make a decision regarding the particular case before payment is authorized.

Third, it can be expected that no public entity likes paying out money, and police officers, and others, must be aware of that fact, and must be aware of the possible political repercussions of authorizing the payment of punitive damage awards.

In any event, the Court does not believe that it should be concerned about where the defendants ultimately obtain the money to pay any awards against them, be it from their own assets, from a relative, from an association, from a fundraiser, or from a

public entity. Nor is the Court concerned about what their arrangements with the other individual, who comes forward after the award is made, might be.

IT IS THEREFORE ORDERED that the Application for the Order Shortening Time is GRANTED, the matter stands submitted, and the motion is DENIED.

DATED: July 22, 1988

/s/ Ferdinand F. Fernandez
FERDINAND F. FERNANDEZ
United States District Judge

APPENDIX B

CALIFORNIA GOVERNMENT CODE

"§ 825. Defense by public entity; payment of judgment, compromise or settlement; punitive damages; memorandum of understanding

"(a) If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise

or settlement of the claim or action to which the public entity has agreed.

"If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good-faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established

that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

"Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages.

"(b) Notwithstanding subdivision (a) or any other provision of law, a public entity, other than the state as defined in Section 900.6, is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion, finds all of the following:

"(1) The judgment is based on an act or omission of an employee or former employee acting within

the course and scope of his or her employment as an employee of the public entity.

"(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

"(3) Payment of the claim or judgment would be in the best interests of the public entity.

"The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

"The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

"(c) Except as provided in subdivision (d), if the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become

effective unless approved by the Legislature in the annual Budget Act.

"(d) The subject of payment of punitive damages pursuant to this section or any other provision of law shall not be a subject of meet and confer under the provisions of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, or pursuant to any other law or authority.

"(e) Nothing in this section shall affect the provisions of Section 818 prohibiting the award of punitive damages against a public entity. This section shall not be construed as a waiver of a public entity's immunity from liability for punitive damages under Section 1981, 1983, or 1985 or Title 42 of the United States Code." (West Supp. 1990).